Supreme Court, U.S.
FILED
NOV - 3 1993
OFFICE OF THE CLERK

93-709

Case No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

G.I. TRUCKING COMPANY,
Appellant/Petitioner,
VS.
INSURANCE COMPANY OF NORTH AMERICA,
Appellee/Respondent.

U.S. Court of Appeal/
9th Circuit No. 92-15234
U.S.D.C. No. CV-91-02631-TEH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL WIRT BAKER
Counsel of Record
JAMES ATTRIDGE
HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY
333 Market Street, Suite 2300
San Francisco, California 94105
(415) 777-3200
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

QUESTION FOR REVIEW:

Does a letter from a shipper's subrogated insurer which reads:

> "... This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you ..."

satisfy the presuit claims filing regulation promulgated by the Interstate Commerce Commission at 49 C.F.R. 1005.2(b)(3), that such claim be made for payment of a specified or determinable amount?

Parties

Plaintiff/Appellant before the Ninth Circuit Court of Appeals and Respondent herein: Insurance Company of North America.

Defendant/Respondent before the Ninth Circuit Court of Appeals and Appellant herein: G.I. Trucking Company. G.I. Trucking Company is a wholly owned subsidiary of Carolina Freight Corporation.

TABLE OF CONTENTS

	Page
Question for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Opinions Delivered In The Case	2
Jurisdiction	2
Statement Of The Case	2
Argument Amplifying Reasons for Allowance of the Writ.	6
Appendix	
A. Opinion from the United States Court of Appeal for the Ninth Circuit	A-1
B. Decision of the United States Court for the Northern District of California	B-1

TABLE OF AUTHORITIES

Cases

	Page
Adams Express Co. v. Croninger, 226 U.S. 491 (1913) ...	6
Insurance Company of North America v. G.I. Trucking, 783 F.Supp. 1251 (N.D. Cal. 1991)	2
Nedlloyd Lines v. Harris Transport, 922 F.2d 905 (1st Cir. 1991)	6
Pathway Bellows v. Blanchette, 630 F.2d 900 (2nd Cir. 1980) cert. den.; 450 U.S. 915, 101 S.Ct. 1357, 67 L.Ed.2d 340 (1981)	6
Salzstein v. Bekins Van Lines, 993 F.2d 1187 (5th Cir. 1993)	6

Codes, Statutes, Rules

49 Code of Federal Regulations	
Section 1005.2	2, 3
Section 1005.2(b)(3)	5
Section 1035.1	2, 3, 4
Section 1035.2	4, 5
28 United States Code	
Section 1254(1)	2
Section 1337	4
49 United States Code	
Section 11707	4

Case No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

G.I. TRUCKING COMPANY,
Appellant/Petitioner,
VS.
INSURANCE COMPANY OF NORTH AMERICA,
Appellee/Respondent.

U.S. Court of Appeal/
9th Circuit No. 92-15234
U.S.D.C. No. CV-91-02631-TEH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, G.I. Trucking Company ("G.I. Trucking") respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 2, 1993.

Opinions Delivered In The Case

Petitioner G.I. Trucking seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit in Opinion No. 91-15234 which was filed and judgment entered in on August 2, 1993. The opinion is contained in this Petition as Appendix A. Though designated for publication, as of the date of this Petition, the opinion has not yet been published in the official reporter. That opinion reversed the decision of the United States District

Court, Northern District of California, which appears at 783 F.Supp. 1251 (N.D. Cal. 1991), and which is contained in this Petition as Appendix Exhibit B.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on August 2, 1993. G.I. Trucking petitioned that Court for rehearing and suggested the appropriateness of Rehearing En Banc on August 16, 1993. By Order dated October 29, 1993, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. 1254(1).

Statement of the Case

This case involves interpretation of two federal regulations, specifically, 49 C.F.R. Section 1005.2 and 49 C.F.R. Section 1035.1, as follows:

> Section 1005.2 Filing of Claims
>
> (a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.
>
> (b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property, (2) asserting liability for alleged

loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however,* That where claims are electronically handled, procedures established to ensure reasonable carrier access to supporting documents.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

49 C.F.R. 1005.2; and

Section 1035.1 Requirement for certain forms of bills of lading

(a) All bills of lading referred to in this Part may be either paper documents or electronically generated and/or transmitted bills of lading.

(b) All common carriers, except express companies, engaged in the transportation of property by rail or by water

subject to the Interstate Commerce Act served with notice of this proceeding and parties thereto, are hereby notified and required to cease and desist on or before August 8, 1919 from using their present bills of lading to the extent that the provisions and regulations contained therein are inconsistent with or different from the provisions and regulations contained in the forms of bills of lading designated as appendixes B and D.

(c) All common carriers subject to the act heretofore served with notice of this proceeding are hereby notified and required to adopt and put in use on or before August 8, 1919, upon notice to the Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act (49 U.S.C. 6), and thereafter to use and employ, uniformly when they issue bills of lading covering shipments, other than livestock, moving in interstate commerce, as required by and defined in section 20 of the act (49 U.S.C. 20), and such forms of bills of lading referred to as appendixes B and D.

§ 1035.2 Appendix D; form of domestic (straight) bill of lading prescribed

(See 49 C.F.R., 1938 ed., 31.2)

Note: Section 2(b) of the bill-of-lading contract terms and conditions is corrected to indicate a nine-month period within which to file claims with carriers on domestic as well as export traffic as a condition precedent to the recovery for loss, damage, injury, or delay to property while in the possession of carriers in accordance with the Act of April 23, 1930, 46 Stat. 251.

49 C.F.R. 1035.1

The plaintiff in this action alleged that defendant damaged a shipment of intraocular lenses while in transit from the United States to Mexico. Jurisdiction in the first instance was predicated upon 28 U.S.C. 1337 in that the action is governed by 49 U.S.C. 11707, an act of Congress regulating commerce.

The shipment moved pursuant to the terms and conditions of the Uniform Domestic Straight Bill of Lading which in conformity with the prescriptions of 49 C.F.R. 1035.2, Appendix D, which provides:

> "As a condition precedent to recovery, claims must be filed with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury, or delay occurred, or carrier in possession when the loss, damage, injury, or delay occurred, within nine months after the delivery of the property (or, in the case of export traffic, within nine months of delivery at port of export) . . . where claims are not filed . . . thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Respondent, Insurance Company of North America ("INA"), plaintiff in the district court proceeding below, was the property loss insurer for the owner of the cargo. The policy limit was $100,000 with a $2,500 deductible. INA's maximum exposure to its insured was $97,500. The insured's loss occurred on or about April 18, 1988. INA took eleven months to adjust the claim and paid its insured $97,500 in March 1989. On March 28, 1989, INA, through its agents, Cigna Property and Casualty Companies and Recovery Services International, filed a Standard Form For Presentation of Loss with G.I. Trucking. When informed that it had sacrificed its subrogation rights by failing to file its claim with defendant G.I. Trucking within nine months, INA contended that it had preserved its rights by sending this letter during the nine month claim period:

> ". . . This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000.00 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you . . ."

G.I. Trucking sought summary judgment before the district court contending that this letter did not constitute a cognizable claim under 49 C.F.R. 1005.2(b)(3) because it provided only an estimate and was not a claim for a specific amount. G.I. Trucking

contended that the purposes of the regulation, as well as those of the Interstate Commerce Act, would be subverted if insurers could avoid the spirit of the rule by sending an inchoate claim featuring an "estimate" in the same amount as its policy limit. The district court agreed. The Circuit Court did not.

Argument Amplifying Reasons For Allowance of the Writ

A writ should issue because the Ninth Circuit Court of Appeals has rendered a decision squarely in conflict with the decisions of three other United States Courts of Appeal on the same matter. At pages 8187 and 8188, the Ninth Circuit's opinion states:

> Other circuits, however, have held that a claim must specify an amount of damages to be considered legally sufficient under the regulations. See *Nedlloyd*, 922 F.2d 905, 908-909 (1st Cir. 1991); *Pathway Bellows v. Blanchette*, 630 F.2d 900, 903 (2nd Cir. 1980). (Court ruled that a letter was not sufficient notice because it did not affirmatively assert liability against the carrier and failed to claim a specified or ascertainable amount of damages.) We expressly reject this conclusion.

Subsequently, the United States Court of Appeals, Fifth Circuit, adopted the contrary view in *Salzstein v. Bekins Van Lines*, 993 F.2d 1187 (5th Cir. 1993), and relied in part on the decision of the district court *sub judice*.

In *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-506 (1913), this court held that the imposition of uniform rules upon shippers and carriers engaged in interstate commerce was necessary to facilitate the orderly and efficient conduct of interstate commerce. The conflict between the Circuits regarding this rule of national application which is pertinent to the everyday workings of the national economy is destructive of that uniformity. Accordingly, this Court should act to resolve the conflict, giving direction to future litigants as to the correct interpretation and application of the subject regulations.

Conclusion

For the reasons stated, this Petition for Writ of Certiorari should be granted by the Court.

Respectfully submitted,

DANIEL WIRT BAKER
HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY
333 Market Street, #2300
San Francisco, California 94105
(415) 777-3200
G.I. Trucking Company
Counsel of Record

JAMES O. ATTRIDGE
HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY
Of Counsel

APPENDIX

A. *Insurance Company of North America v. GI Trucking*, No. 92-15-234, August 2, 1993 ..... A-1

B. *Insurance Company of North America v. GI Trucking*, 783 F.Supp. 1251 (N.D. Cal. 1991) B-1

APPENDIX, EXH. 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellant,

v.

G.I. TRUCKING COMPANY, et al.,
Defendant-Appellee.

No. 92-15234
D.C. No. CV-91-02631-TEH
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
June 18, 1993 — San Francisco, California

Filed August 2, 1993
Before: Thomas E. Fairchild*, Robert R. Beezer,
Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

The court of appeals reversed a judgment of the district court. The court held that a writing communicating the fact of damage and an intent to hold the carrier liable was sufficient notice of claim under regulations of the Interstate Commerce Commission.

Appellant Insurance Company of North America was subrogee of the rights of its insured against appellee G.I. Trucking Company for damage to goods transported by G.I. in April 1988. In December 1988, INA sent a letter to G.I. that identified INA and its relationship to the shipper, the shipment in question, and an

---

*Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

estimate of a $100,000 loss. INA eventually paid its insured $97,500. G.I. denied liability. In 1991, INA sued G.I. in state court, alleging carrier liability and negligence. G.I. removed the case and moved for summary judgment in district court, contending that INA and its insured had failed to give written notice of the claim within nine months as required by the contract, which incorporated by reference the Uniform Bill of Lading. The court granted the motion. INA appealed.

[1] The ICC regulations concerning the UBL require that a written notice of claim identify the shipment, assert a liability claim, and claim payment of a specified or determinable amount, **[2]** and, in the case of uncertain amounts, that the carrier receiving the notice investigate to determine the condition of the shipment at the time of delivery and the extent of the loss for which it might be responsible.

[3] Although no Ninth Circuit case had directly addressed whether those regulations applied to contested cases, one case implied that they did, and if they were held not to so apply, a carrier would be able to control its own obligations under the regulations by deciding whether to contest a claim or not, which would permit precisely the type of discrimination among claimants that the regulations were intended to address. Therefore, the regulations applied to INA's case.

[4] INA's written communication of damage and of its intent to hold G.I. liable was sufficient notice under the regulations because it enabled G.I. to make a prompt investigation, which was the purpose of the written claim requirement, not to permit the carrier to escape liability.

COUNSEL

Glen R. Olson, Long & Levit, San Francisco, California, for the plaintiff-appellant.

James Attridge, Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco, California, for the defendant-appellee.

Kenneth E. Siegel and Patricia J. McCabe, Alexandria, Virginia, and William D. Bierman, Westwood, New Jersey, for the amicus.

OPINION

WIGGINS, Circuit Judge:

FACTS

On April 19, 1988, G.I. Trucking Company ("G.I.") transported a shipment of intraocular lenses from Los Angeles to Calexico, California, for Eye Technology, Inc. ("Eye Tech"). The shipment was damaged, and Eye Tech sought and received compensation for its damages from its insurer, Insurance Company of North America ("INA"). Having paid Eye Tech's claim, INA became the subrogee of Eye Tech's rights against G.I.

On December 2, 1988, Recovery Services, International ("RSI"), INA's subrogation unit, sent a letter to G.I. stating:

> We are the Subrogation Dept. for the Insurance Co. of North America: The Insurer of Eye Technology Inc. This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (Estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you. We are enclosing herewith supporting documents pertaining to above file for your record.

On March 3, 1989, INA paid Eye Tech $97,500, and on March 27, 1989, RSI forwarded a "Standard Form for Presentation of Loss" to G.I. Trucking, claiming entitlement to $100,000.00. On April 4, 1989, G.I. denied responsibility and refused to pay the claim. The parties corresponded over the course of several months, but G.I. continued to deny any liability on INA's claim.

On April 4, 1991, INA filed suit against G.I. in California State court. INA asserted two causes of action, one for carrier liability and one for negligence. G.I. denied the allegations and removed the action to federal district court. G.I. then filed a motion for summary judgment, alleging that INA and Eye Tech had failed to file a claim for losses within the nine month period as per the bill of lading, the Carmack amendment, and regulations promulgated thereunder.

The district court granted G.I.'s motion for summary judgment stating that "[clearly] . . . the plaintiff's December 2nd claim was for an 'uncertain amount' and did not constitute a legally sufficient claim within the requirements of the ICC regulations." INA appeals.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992); *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there is a genuine issue of material fact and whether the district court applied the relevant substantive law correctly. *F.D.I.C.*, 969 F.2d at 747, *Jones*, 968 F.2d at 940.

DISCUSSION

G.I. Trucking and Eye Tech entered into a carrier contract that incorporated by reference the Uniform Bill of Lading ("UBL") as part of the contract. Section 2.(b) of the UBL indicates that a written claim must be filed within nine months for a party to recover from a carrier for damage, loss, or delay. Courts have long recognized the reasonableness and validity of such provisions in bills of lading and have routinely enforced them. *See e.g., Northern Pac. Ry. v. Mackie*, 195 F.2d 641, 642 (9th Cir. 1952). Parties, however, are forever litigating whether a particular communications constitutes a sufficient written notice of claim. Indeed, that is the issue before us.

G.I. contends that INA cannot recover for its losses because of its failure timely to file a written notice of claim. INA, on the other hand, maintains that its December 2nd letter satisfies the claim requirement. We agree with INA.

[1] The Interstate Commerce Commission ("ICC") has promulgated regulations that outline the minimum requirements of a written notice of claim under the UBL. The regulations provide that a notice must be in writing and contain (1) "facts sufficient to identify the baggage or shipment . . . of property,

(2) [an assertion] of liability for alleged loss, damage, injury, or delay, and (3) a claim for the payment of a specified or determinable amount of money[.]" 49 C.F.R. § 1005.2(b) (1992).

[2] Paragraph (d) of § 1005.2 deals specifically with claims for uncertain amounts. 49 C.F.R. § 1005.2(d) (1992). It states that when such a claim is filed, the carrier against whom it is filed shall determine the condition of the baggage or shipment involved at the time of delivery and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which the carrier may be responsible. *Id.* Paragraph (d) proscribes voluntary payment of the claim until a formal claim in writing is filed in accordance with the provisions of the paragraph (b). *Id.*

Initially, it appears that these regulations govern resolution of this case. However, the circuits are split on the issue of whether the regulations apply to contested claims. Thus, the first issue we must resolve is whether the ICC regulations outlined above apply here.

Section 1005.1 of the ICC regulations, entitled "Applicability of regulations," provides that the regulations "shall govern the processing of claims for loss, damage, injury, or delay to property transported . . . in interstate or foreign commerce . . ." *Id.* § 1005.1. The First and Second Circuits have concluded that this language indicates that the regulations are meant to apply to all claims against carriers, contested or uncontested. *See Nedlloyd Lines v. Harris Transport*, 922 F.2d 905, 907 (1st Cir. 1991); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 904 (2nd Cir. 1980) (stating that "the regulations provide the appropriate standard for assessing the sufficiency of all claims irrespective of the way they may subsequently be resolved or adjudicated"), *cert. denied*, 450 U.S. 915 (1981). The Seventh Circuit, however, has ruled that the regulations apply only to uncontested claims. *See Wisconsin Packaging Co. v. Indiana Refrigerator Lines, Inc.*, 618 F.2d 441, 445 (7th Cir.) (en banc), *cert. denied*, 449 U.S. 837 (1980).

[3] While this court has decided two "written claims" cases since promulgation of the regulations, neither of the decisions directly address whether the regulations apply to contested

claims. *See Culver v. Boat Transit, Inc.*, 782 F.2d 1467 (9th Cir. 1986); *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364 (9th Cir. 1985). However, the *Culver* court implies that the regulations apply to contested claims. *See Culver*, 782 F.2d at 1468-69 & n.1 (addressing certain provisions of 49 C.F.R. § 1005 and indicating that they are consistent with the court's decision). Moreover, we find the rationale of *Nedlloyd* persuasive on this issue. In holding that the regulations applied to contested as well as uncontested claims, the *Nedlloyd* court stated:

> If the ICC regulations were held to apply only to uncontested claims, a carrier could control its own obligations under the regulations by deciding whether or not to contest a claim. In other words, once it received an adequate notice of claim, a carrier could choose to settle the claim voluntarily, in which case it would be required to follow the ICC regulations concerning processing and payment. Alternatively, by denying liability, the shipper could avoid the ICC procedure for responding to an adequate claim and force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-settled claims would permit precisely the type of discrimination among claimants that the regulations were intended to address.

Nedlloyd, 922 F.2d at 908 (citation omitted). Based on the implied application of the regulations to a contested claim in *Culver* and the rationale of *Nedlloyd*, we hold that the ICC regulations apply to contested claims.

However, our determination that the regulations apply to contested claims does not completely resolve this case. We must also determine whether a written claim must specify a dollar amount to be legally sufficient under the regulations. While this court has never addressed this question directly, we have held that a claim, which did not specify an amount, was legally sufficient following promulgation of the regulations. *Culver*, 782 F.2d at 1467-69. Other circuits, however, have held that a claim must specify an amount of damages to be considered legally sufficient under the regulations. *See Nedlloyd*, 922 F.2d at 908-09; *Pathway Bellows*, 630 F.2d at 900-03 (court ruled that a letter was not sufficient notice because it did not affirmatively assert liability against the

carrier and failed to claim a specified or ascertainable amount of damages). We expressly reject this conclusion.

Cases decided by this court after promulgation of the ICC regulations have held that written claims are to be liberally construed and that the standard for determining sufficiency is one of substantial performance. *Taisho*, 762 F.2d at 1368; *see also Culver*, 782 F.2d at 1469. Citing *Wisconsin Packing*, the *Taisho* court stated that "[t]he form of the written notice is less important than its adequacy in apprising the carrier of the basis for the claim and of the fact that reimbursement will be sought." *Taisho*, 762 F.2d at 1368. The *Culver* court limited *Taisho*, noting that "*Taisho* simply relaxed the need for a formal claim in limited situations." *Culver*, 782 F.2d at 1469. The *Culver* court also indicated that after *Taisho* a shipper cannot recover damages if a written claim is required under the bill of lading, and one is not filed within the period provided by the bill. *Id.* Moreover, the *Culver* court concluded that "[1] a written notice of damage, coupled with [2] a clearly communicated intent to hold the carrier liable, plus [3] the carrier's investigation, sufficies as a written claim." *Id.* Notably, the court did not indicate that an amount had to be specified in order to satisfy the written claim requirement.[1]

[4] Here, there was a written notice of damage and a clearly communicated intent to hold G.I. liable. Moreover, the record indicates that G.I. performed some investigation of the

---

[1]The district court indicated that the plaintiff in *Culver* had noted the amount of damage on the bill of lading. Thus, the district court concluded that *Culver* supported G.I.'s position because the notation on the bill of lading provided the parties in that case with the exact information that the parties here lacked, i.e., the amount of damages. However, the district court misapprehended the character of the notation on the bill of lading in *Culver*. The notation on the bill of lading stated: "Damage to boat due to accident 1/18/82. Damage and repair pending." *Culver*, 782 F.2d at 1468. No dollar amount was attached to the damages until later.

claim.[2]Under *Taisho* and *Culver*, nothing more is required to satisfy the written claim requirement. Indeed, the purpose of the written claim requirement is not to permit the carrier to escape liability, but to insure that the carrier may make a prompt and thorough investigation of the claim. *See Culver*, 782 F.2d at 1469; *Pathway Bellows*, 630 F.2d at 903 n.5. The December 2nd letter accomplished this purpose.

In addition, we are not convinced that the December 2nd letter does not satisfy the regulations even if strictly applied.[3] INA sent a written communication that clearly identified the shipment and asserted liability. Moreover, while the letter did not specify an amount of damages, that amount was arguably determinable from the other information given in the letter or already available to the carrier. While some would debate whether the claim complied with the regulations in every respect, a liberal construction of the

---

[2]It is unclear from the record to what extent G.I. investigated this claim. At the hearing on the motion for summary judgment, the parties appeared to agree that the reason an amount had not been specified by INA within the nine month period was because INA was looking into the possibility of salvaging the lenses. Both parties apparently thought that the lenses could be resterilized and sold on the market. G.I. maintains that it did not perform the kind of investigation it normally would have in the case of a $100,000 claim because it believed that the goods would be salvaged. G.I. contends that this belief was based on representations made by Eye Tech and INA.

Were we to rule in G.I.'s favor on the basis that a full investigation was not undertaken, we would create a rule that would permit a carrier to avoid liability by failing to investigate a claim even when provided with the information necessary to undertake the investigation. Thus, we conclude that a shipper's failure to investigate a claim or failure thoroughly to investigate a claim when provided with the necessary information, including facts necessary to identify the goods and put the shipper on notice as to the potential liability, will not prevent recovery for the damaged goods.

[3]As indicated previously, we must construe a written claim liberally under a standard of substantial performance. *See Taisho*, 762 F.2d at 1368.

letter leads to the conclusion that the letter substantially complied with the regulations.[4]

Finally, it seems that the notice in this case served its purpose. It identified the shipment, contained a clear intention to hold the carrier liable, and gave what proved to be an accurate estimate of the claim amount. No more is needed to permit the shipper to make a prompt and thorough investigation, which is the purpose of the notice requirement. *See Culver,* 782 F.2d at 1469. Accordingly, we conclude that the Dec. 2nd letter was a legally sufficient written notice of claim, and we REVERSE the district court's grant of summary judgment in favor of G.I.

---

[4]G.I. also argues that paragraph (d) of 49 C.F.R. § 1005.2, entitled "Claims for uncertain amounts," precludes INA's action for damages. However, we read the paragraph differently. Paragraph (d) proscribes voluntary payment of a claim that does not meet the requirements of paragraph (b), but it does not necessarily preclude the presentation of such a claim in a court of law. The First Circuit has indicated that the regulations must be read to bar a subsequent suit if a sum certain of damages is not claimed within the nine month period. *Nedlloyd*, 922 F.2d at 908. Otherwise, the court contends the regulatory purpose of encouraging voluntary settlement would be frustrated because a shipper could bring an action against a carrier without first providing the carrier the opportunity voluntarily to pay a properly notified claim. *Id.* We find this argument unpersuasive. We fail to see why shippers will be eager to circumvent the notice requirements, avoid voluntary settlement, and embark upon expensive, time-consuming litigation to recover their damages. Moreover, we believe that there are circumstances, such as those presented by the facts of this case, in which a claim should be considered sufficient even though it does not specify the amount of damages. *See also Nedlloyd,* 922 F.2d at 909 (excusing the failure to specify an amount of damages in certain situations).

APPENDIX, EXH. 2

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff,

v.

G.I. TRUCKING CO., et al.,
Defendants.

No. C91-2631 TEH.

United States District Court,
N.D. California.

Dec. 31, 1991.

Shipper's insurer sued carrier to recover payment made to insured for loss resulting from damage to shipment of intraocular lenses. Carrier moved for summary judgment on ground that claim was not made within nine-month period established under uniform straight bill of lading, Carmac Amendment to Interstate Commerce Act, and ICC regulations. The District Court, Thelton E. Henderson, Chief Judge, held that: (1) insurer's letter giving preliminary notice of claim which contained estimate of shipper's loss did not constitute claim within meaning of governing ICC regulations, and (2) ICC regulations setting forth minimum filing requirements for filing of cognizable claim applied to contested as well as voluntarily paid claims.

Motion granted.

1. Commerce § 85.31

The letter of a shipper's insurer conveying preliminary notice of estimate of shipper's loss to carrier which contained estimate of claimed loss did not constitute "claim" within meaning of governing Interstate Commerce Commission regulations; estimate of damages of $100,000 was not sufficient to inform carrier of specific amount of claim as required by regulations. 49 U.S.C.A. § 11707(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Commerce — 85.1

Interstate Commerce Commission regulations setting out minimum filing requirements for filing of cognizable claim applied to contested as well as voluntarily paid claims. 49 U.S.C.A. § 11707(a).

Kenneth F. Lovett, San Francisco, Cal., for plaintiff.

William D. Taylor, James Attridge, Hanson Bridgett Marcus Vlahos & Rudy, San Francisco, Cal., for defendants.

ORDER

THELTON E. HENDERSON, Chief Judge.

This matter comes before the court on the defendant's motion for summary judgment, filed with the court on October 15, 1991. The motion came on for oral argument on Monday, December 16, 1991 at 10:00 a.m. After careful consideration of the moving papers, declarations, and oral arguments, the court is satisfied that summary judgment should be GRANTED in favor of the defendants.

FACTUAL BACKGROUND

Eye Technology contracted with G.I. Trucking to carry a shipment of intraocular lenses from Los Angeles to Calexico, California en route to Mexico. The lenses were insured by INA. On or about April 18, 1988, the lenses were damaged.

On December 2, 1988, approximately eight months after receipt of the damaged lenses, INA sent the following communication to G.I. Trucking:

> . . . This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim to you . . .

Declaration of James Attridge, ¶ 5, Exh. D-2. However, no further notice firmly establishing the specific amount of the claim was sent to G.I. Trucking until March 28, 1989, over eleven months after the damaged cargo was delivered.

The plaintiff and defendants represented at oral argument that a reason for the delay in identifying the exact amount of the damage was that after the damage occurred the plaintiff believed that it might be possible to salvage the shipment, at least in part. The parties agreed that the plaintiff made the defendant aware of the intent to attempt to salvage the shipment. In addition, G.I. Trucking had no knowledge of the actual value of the shipment. G.I. Trucking's tariff required that the value of items of extraordinary worth be stated on the bill of lading. Here, the shipper did not do so.

NATURE OF THE MOTION

The defendants (G.I. Trucking) move for summary judgment, claiming that INA failed to make a legally sufficient claim within the nine month period established under the uniform straight bill of lading, the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707(a), and the regulations promulgated thereunder, 49 C.F.R. § 1035.2, (ICC regulations), and is therefore barred from bringing this action. G.I. Trucking contends that under the terms of the bill of lading at issue and the ICC's regulations, INA was required to make a legally sufficient claim within nine months of receipt of the damaged goods. G.I. Trucking contends that no claim meeting the specificity requirements of the Carmack Amendment, the bill of lading, and the ICC regulations was made until over eleven months after receipt of the damaged goods.

INA contends that its letter of December 2, 1988, received approximately eight months after the April 18, 1988 receipt of the damaged goods, constituted a legally sufficient notice of claim. G.I. Trucking contends that the December 2, 1988 letter did not meet the relevent legal requirements under the ICC regulations, the bill of lading, and the Carmack Amendment because it did not state the specific amount of the claim, but gave only an estimate.

The sole issue is whether the December 2, 1988 letter constituted a claim within the meaning of the bill of lading, the ICC regulations and the Carmack Amendment.

LEGAL STANDARD

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); Fed.R.Civ.P. 56(c). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgement may be granted." *Id.* 477 U.S. at 251, 106 S.Ct. at 2511 (citations omitted). In ruling on a summary judgement motion, a court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Poller v. CBS, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

A party seeking summary judgement bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof on an issue at trial, she must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Whereas, the moving party can prevail on a motion for summary judgement on an issue for which her opponent will have the burden of proof at trial by merely "pointing out to the District Court — that there is an absence of evidence to support the nonmoving paty's case." *Id.*

If the moving party meets its initial burden, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial" to defeat the motion. *Anderson, supra,* 477 U.S. at 250, 106 S.Ct. at 2511; Fed.R.Civ.P. 56(e).

In this case there is no dispute over the material facts. Therefore, the sole question is whether the moving party is entitled to judgement as a matter of law.

DISCUSSION

The parties do not dispute that the Carmack Amendment governs this action. Under the Interstate Commerce Commission's regulations, bills of lading must incorporate a "nine-month period within which to file claims with carriers of domestic as well as export traffic as a condition precedent to the recovery for loss, damage, injury or delay to property while in the possession of carriers." 49 C.F.R. § 1035.2. The bill of lading at issue in this action was in compliance with this provision and therefore incorporated the nine-month claims limitations period. The nine month rule is anticipated and sanctioned by the Carmack Amendment. 49 U.S.C. § 11707(e).

There is no question that a failure to file a claim within the nine month period is absolutely fatal to the claim. *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364, 1369 (9th Cir.1985); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir.1980), *cert. den.* 450 U.S. 915, 101 S.Ct. 1357, 67 L.Ed.2d 340 (1981). Therefore the March 28, 1989 claim, filed over 11 months after receipt of the damaged cargo, cannot be deemed to have been sufficient notice within the terms of the bill of lading. Thus, the sole question is whether the December 2, 1988 correspondence constituted sufficient notice.

[1] The central point of contention is whether it is necessary for the claimant to specify in its notice of claim the specific sum claimed. The December 2, 1988 correspondence contained only an estimate of damages rather than a specific amount.

At page 3 of its opposition, the plaintiff concedes that 49 CFR § 1005.2 sets out the minimum filing requirements for the filing of a cognizable claim, and that subsection (b) of that regulation establishes as a "minimum filing requirement" that the communication from the claimant: "(1) Contain[ ] facts sufficient to identify the baggage or shipment . . .; (2) Assert[ ] liability for the loss, damage, injury or delay, and; (3) Mak[e] a claim for the

payment of a specified or determinable amount." The defendant points to subsection (d) of the same regulation, which reads:

> (d) Claims filed for uncertain amounts. Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it . . . and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section. 49 CFR § 1005.2(d).

Given that the plaintiff concedes the applicability of subsection (b) of the above regulation, subsection (d) must also be applicable.

It is clear that the December 2, 1988 communication contained facts sufficient to identify the baggage or shipment and asserted liability for the loss, damage, injury or delay. The sole question is whether the estimate of damage was sufficiently specific within the terms of subsections (b) and (d). The plaintiff contends that the estimate of damages of $100,000 was sufficient to satisfy the third requirement. The defendant contends that this estimate was not sufficiently specific under the terms of the regulation.

The overriding purpose of the ICC regulations was "to discourage discrimination on the part of carriers by facilitating the voluntary settlement of claims." *Nedlloyd Lines v. Harris Transport*, 922 F.2d 905, 908 (1st Cir. 1991). Prior to the enactment of the regulations, carriers often forced even legitimate claims into lengthy litigation. The situation resulted in carriers engaging in discrimination between favored and disfavored shippers. "Carriers could admit liability and quickly pay the claims of favored shippers while dragging other shippers, with similar claims, through the long, inconsistent and expensive litigation process. (citation). This form of discrimination was one of the evils the Carmack Amendment sought to eliminate." *General Elec. Co. v.*

Brown Transport Corp., 597 F.Supp. 1258 (E.D.Va.1984). The ICC regulations required that a carrier would be precluded from collection unless it made an early and specific claim, thereby allowing *any* shipper, large or small, to voluntarily settle a claim without litigation.

Unfortunately, the circuits are divided as to the application of the ICC regulations, with the First and Second Circuits, and several lower courts holding that the ICC's regulations require the claimant to specify a specific dollar sum within the nine month period, while the Seventh Circuit has held that no such specific designation is required. However, the rule of the First and Second Circuits is clearly the majority rule, and it is much more reasonable.

The reasoning adopted by the Second Circuit is discussed clearly by the Southern District Court of New York in a case remarkably similar to the one at bar. In *Bobst Division v. IML Freight, Inc.*, 566 F.Supp. 665 (S.D.N.Y.1983), the court passed upon the sufficiency of a letter which read as follows:

> Please be advised that the above referenced machine which arrived in Port Newark on or about December 26, 1977, was found to be damaged. The estimated amount of damage is approximately $100,000.00.
>
> By notice of this letter, we hold your company liable for said damages. A claim will be filed on our behalf by our insurance company, who will contact you regarding this shipment.

The *Bobst* court held that the statement, "The estimated amount of damage is approximately $100,000.00," did not constitute a claim for a "specified amount," or a "determinable" amount. *Id.* at 669. The *Bobst* court noted the similarity of such a claim to the example of an insufficient claim given in the ICC regulations, which refer to a claim "for an uncertain amount such as $100 more or less . . ." Id., citing 49 CFR § 1005.2(d). As such, the *Bobst* court held that the claim at issue was for an "uncertain amount," and could not "be regarded as constituting compliance with the minimum filing requirements contained in subsection (b) [of 49 CFR 1005.2]." Id.

The claim at issue in the case at bar is virtually indistinguishable from the claim in *Bobst*. In the December 2, 1988 letter, INA informed G.I. Trucking of a claim for an "amount of $100,000 (estimate)." As if to emphasize the uncertainty of this estimate, the same paragraph in the December 2 letter continued, "Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim to you." Furthermore, after the damage the plaintiff had informed G.I. Trucking that it was examining the possibility of salvaging the damaged lenses, which might have substantially mitigated the damages. Clearly, under the rationale of the *Bobst* court, the plaintiff's December 2nd claim was for an "uncertain amount," and did not constitute a legally sufficient claim within the requirements of the ICC regulations. The letter was not sufficient to inform the defendants of the specific amount of the claim.

The *Bobst* decision flowed directly from the Second Circuit's conclusion in *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 904 (2d Cir.1980), that the ICC regulations "provide the appropriate standard for assessing the sufficiency of all claims . . ." The *Pathway Bellows* court held that a claim letter that "failed to claim a specified or ascertainable amount of money as damages" was insufficient under the ICC regulations, and therefore precluded recovery of damages. *Id.* at 908.

The First Circuit has applied the same rule. In *Nedlloyd Lines v. Harris Transport*, 922 F.2d 905 (1st Cir.1991), the court held that the plaintiff was barred from recovering damages because although it filed two claims within the nine month period, neither specified the amount of money claimed. *Id.* at 908. The First Circuit explained that the purpose of the ICC regulations was to encourage voluntary resolution of shipping damage disputes "by ensuring that both shipper and carrier have adequate information to evaluate liability and the extent of damages." The court found that the plaintiff's failure to specify an amount claimed undermined this purpose: "Nedlloyd's notice of claim failed to specify an amount, Harris could not have voluntarily paid the claim, even if it had been inclined to do so." The court found the plaintiff's claim therefore to be barred, and held that to allow the action to

proceed would "frustrate the regulatory purpose of encouraging voluntary settlement . . ." *Id.* at 908.

The Eastern District Court of Virginia, after engaging in a detailed discussion of legislative history, also concluded that the ICC regulations apply to disputed as well as voluntarily settled claims and require the plaintiff to submit a claim for a specific dollar amount within the nine month period. *General Elec. Co. v. Brown Transport Corp.*, 597 F.Supp. 1258 (E.D.Va.1984); *see also, Calpro Co. v. Consolidated Engineering Co.*, 502 F.supp. 707, 713-14 (N.D.Ga.1980); *R.T.A. Corp. v. Consolidated Rail Corp.*, 594 F.Supp. 205, 209-10 (S.D.N.Y.1984).

[2] The plaintiff, however, points to the *en banc* decision of the Seventh Circuit in *Wisconsin Packing Co. v. Indiana Refrigerator Lines*, 618 F.2d 441 (7th Cir.1980) (en banc). In that case the Seventh Circuit acknowledged that a purpose of the ICC regulations was to facilitate settlement. However, the *Wisconsin Packing* court reasoned that this purpose was only relevant for claims which were voluntarily settled, and was irrelevant for litigated claims. *Id.* at 445. Where the claim is litigated, the Seventh Circuit held that the sufficiency of the claim was to be assessed under the case law developed prior to the issuance of the ICC regulations. These cases would allow recovery without the amount of the claim having been specified. *Id.* The Seventh Circuit reasoned that a primary purpose of the notice requirement was to expeditiously inform the shipper of any claims so that the claims could be researched while recollections were fresh. Notice of the precise amount of the claim was not necessary to serve this purpose, but only notice sufficient to allow the shipper to investigate the claim. Therefore, the Seventh Circuit held that the ICC regulations did not govern the sufficiency of claim notices in litigated claims.

The Seventh Circuit's reasoning is clearly the minority rule. The *Wisconsin Packing* decision has been widely criticized on the ground that the purpose of the ICC regulation is to encourage settlement of all claims, not just some, and claims are much more likely to settle if a precise dollar sum of the claim has been established. Under the Seventh Circuit's reasoning, a shipper could simply refuse to claim a precise dollar sum, thereby forcing

litigation and avoiding the requirements of the ICC regulations altogether. There is no apparent rationale in either the language or purpose of either the ICC regulations or the Carmack Amendment to suggest that the regulations are to apply only to voluntarily settled claims and not to litigated claims. As the First Circuit noted in *Nedlloyd*:

> Uniform application of the regulations to all claims protects shippers as well as carriers. If the ICC regulations were held to apply only to uncontested claims, a carrier could control its own obligations under the regulations by deciding whether or not to contest a claim. In other words, once it received an adequate notice of claim, a carrier could choose to settle the claim voluntarily, in which case it would be required to follow the ICC regulations concerning processing and payment . . . Alternatively, by denying liability, the shipper could avoid the ICC procedure for responding to an adequate claim and force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-settled claims would permit precisely the type of discrimination among claimants that the regulations were intended to address."

In addition to the First Circuit, *Wisconsin Packing* has been expressly rejected for similar reasons by the Second Circuit, *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 903-04 (2d Cir.1980) ("we do not believe that the dual standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or to contest its liability, were either intended or mandated."); the Southern District of New York, *Bobst Division v. IML Freight, Inc.*, 566 F.Supp. 665 (S.D.N.Y.1983) and *R.T.A. Corp. v. Consolidated Rail Corp.*, 594 F.Supp. 205, 209 n. 7 (S.D.N.Y.1984) (rejecting Seventh Circuit rule and citing numerous courts which have followed the Second Circuit); the Northern District of Georgia, *Calpro Co. v. Consol. Engineering Co.*, 502 F.Supp. 707, 712 (N.D.Ga.1980) (rejecting the Seventh Circuit rule and noting the "every other federal district or appellate court to consider the question of the I.C.C. regulations' scope has reached the opposite conclusion"); and the Eastern District of Virginia, *General Elec. Co. v. Brown Trans. Corp.*, 597 F.Supp. 1258 (E.D.Va.1984) ("the Court is of

the opinion that the Seventh Circuit's voluntary/involuntary distinction was neither intended nor mandated by the ICC regulations.")

Moreover, as noted by the Second Circuit, the plain language of the ICC regulations state their application to "the full range of matters relating to the filing of claims . . ." *Pathway Bellows*, 630 F.2d at 904 n. 7, quoting 40 CFR § 1005.1.[1] This court is in agreement with the First Circuit and Second Circuits that "the ICC regulations apply to contested as well as voluntarily paid claims." 922 F.2d at 908.

The plaintiff points out that the Ninth Circuit in *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364, 1368 (9th Cir.1985) relied upon *Wisconsin Packing*, in holding that "The form of the written notice is less important than its adequacy in apprising the carrier of the basis for the claim and of the fact that reimbursement will be sought." This court notes that the Ninth Circuit's citation to *Wisconsin Packing* was mere *dicta*, and as such is not binding upon the court. The plaintiff ignores the outcome of *Taisho*, in which the court held that the plaintiff could *not* maintain its claim because of late filing. The *Taisho* decision turned on the fact that the notice in that case was insufficient because it was not timely, a matter about which there is no division among the circuits. The *Taisho* court did not specifically address the question now before this court, that is,

---

[1]The ICC regulations at issue state:

We are persuaded by the record in this proceeding that our regulations should embrace the full range of matters relating to the filing of claims, including a prescription of minimum filing requirements and a consideration of documents that do not constitute claims, and claims for uncertain amounts . . .

Thus, the rules set forth in sections 1005.1 and 1005.2 . . . first establish their overall applicability and then set out the manner and form in which loss and damage claims must be filed by claimants in order to accomplish the improvements shown to be required in the public interests in this area.

Ex Parte No. 263; Rule, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972).

whether the notice of claim must state a specific dollar sum. In addition, the Ninth circuit in *Taisho* did not even address the Second Circuit's, or any other court's criticism of the Seventh Circuit's *Wisconsin Packing* decision. Under the circumstances, it is clear to this court that the Ninth Circuit, in the cited dicta from *Taisho*, did not directly address the question now before the court, and did not intend to direct the lower courts to follow the Seventh Circuit's *Wisconsin Packing* rule. This case clearly illustrates the problem of dicta and the reasons that it does not create binding precedent.

The plaintiff also cites *Culver v. Boat Transit, Inc.*, 782 F.2d 1467 (9th Cir.1986). However, *Culver* actually weighs in favor of the defendant. The *Culver* court cited the Ninth Circuit's decision in *Northern Pac. Ry. v. Mackie*, 195 F.2d 641 (9th Cir. 1952), which required strict compliance with the written claim notice requirements, and noted the apparent conflict between *Taisho* and *Mackie*. However, *Culver* resolved the conflict by substantially limiting *Taisho's* application. ("*Taisho* simply relaxed the need for a formal claim in limited situations.") *Culver*, 782 F.2d at 1469. In remanding the case and reversing the trial court's grant of summary judgment against the plaintiff, the *Culver* court expressly noted that "there was notation on the bill of lading noting the damage caused by the accident." 782 F.2d at 1469 n. 2. Therefore, the parties in *Culver* had exactly the information concerning the amount of damages which the parties in the instant action lacked. The *Culver* court reaffirmed the strict notice requirements of *Mackie*, even in the face of *Taisho*, thereby undermining the plaintiff's case.

The court finds the reasoning of the First and Second Circuits to properly state the law. We therefore find that the ICC regulations establish the proper standards for evaluating the sufficiency of all claims. In this case, it is clear in light of *Bobst, Pathway Bellows, Nedlloyd,* and *Brown Transport* that the December 2, 1988 claim letter was not sufficiently specific within the terms of the ICC regulations. Therefore, it is clear that the plaintiffs are barred from proceeding with this action. *Pathway Bellows, supra; Nedlloyd Lines, supra.*

The parties do not dispute the facts which are material to this motion for summary judgment. Plaintiff's opposition to defendants motion to dismiss at 2. Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); Fed.R.Civ.P. 56(c). Since it is clear that on the undisputed facts the defendant is entitled to judgment as a matter of law, summary judgment should be GRANTED.

For the foregoing reasons and in accordance with the above, after careful consideration of the submissions and written and oral arguments of the parties, and good cause appearing therefor, IT IS HEREBY ORDERED that:

1. Summary judgment is GRANTED in favor of the defendants.

IT IS SO ORDERED.

B-14

Deepak KUMAR and Lakhibir Singh,
Petitioners,

v.

David N. ILCHERT, District Director,
Immigration and Naturalization Service,
Respondent.

No. C-91-4032-DLJ.

United States District Court,
N.D. California.

Jan. 2, 1992.

Alien applicant for admission applied for parole. District Director of Immigration and Naturalization Service denied parole. Alien petitioned for writ of habeas corpus. The District Court, Jensen J., held that delay, attributable in part to alien's motion for change of venue, was not emergent cause or circumstance qualifying alien for parole.

Petition denied.

1. Aliens § 53.9

Arriving alien who does not appear to be clearly and beyond doubt entitled to land may be detained for further inquiry; likewise, alien who arrives without documents may also be detained. Immigration and Nationality Act, § 235(b), as amended, 8 U.S.C.A. § 1225(b).

2. Aliens § 53.9

Alien detained for failing to appear to be entitled to land or who arrives without documents may request parole. Immigration and Nationality Act, § 212(d)(5)(A), as amended, 8 U.S.C.A. § 1182(d)(5)(A).

3. Aliens § 53.9

Delay in bringing arriving alien before Immigration Court for determination of exclusion status did not justify paroling alien for emergent or humanitarian reasons strictly in public interest; exclusion proceedings had been commenced, alien appeared before Immigration Court within two months of arrival in United States, and alien requested change of venue which contributed to delay in scheduling hearing. Immigration and National Act, § 235(b), as amended, 8 U.S.C.A. 1225(b).

Jonathan M. Kaufman of Alan Kaufman, San Francisco, Cal., for petitioners.

Alberto E. Gonzalez, Sp. Asst. U.S. Atty., San Francisco, Cal., for respondent.

ORDER

JENSEN, District Judge.

On December 11, 1991, this Court heard petitioner Deepak Kumar's petition for a writ of habeas corpus.[1] Jonathan M. Kaufman appeared for petitioner. Assistant United States Attorney Alberto E. Gonzalez appeared for respondent. Having considered the papers submitted, the arguments of counsel, the applicable law, and the entire record herein, the Court DENIES the petition.

I. BACKGROUND

Petitioner Kumar is an alien applicant for admission to the United States who is presently in the custody of the United States Immigration and Naturalization Service ("INS"). Respondent is the District Director of the INS. Petitioner seeks review of

---

[1]At the hearing, both parties represented to the Court that petitioner Lakhbir Singh has been paroled from INS custody. Petitioner Singh's petition will be dismissed as moot.

respondent's denial of parole to petitioner, pursuant to an application for a writ of habeas corpus (28 U.S.C. § 2241).

Petitioner arrived in the United States at Los Angeles airport on September 24, 1991. Petitioner arrived without travel documents and was detained by the INS per-

93-709

Case No.

Supreme Court, U.S.
FILED
DEC - 2 1993
OFFICE OF THE CLERK

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1993

G.I. TRUCKING COMPANY,
Appellant/Petitioner,

VS.

INSURANCE COMPANY OF NORTH AMERICA,
Appellee/Respondent.

U.S. Court of Appeal/
9th Cir. No. 92-15234
U.S.D.C. No. CV-91-02631-TEH

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLEN R. OLSON
Counsel of Record
ROBERT C. CHILES
LONG & LEVIT
101 California Street, Suite 2300
San Francisco, California 94111
(415) 397-2222
Attorneys for Respondent

BEST AVAILABLE COPY

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

Question For Review:

Does a subrogated insurer's letter which is filed within nine months, identifies the shipment and goods in question, contains an assertion of the common carrier's liability and sets forth an estimated amount of the claim, satisfy the claims filing requirements of the Interstate Commerce Commission, 49 C.F.R. section 1005.2?

Parties

Plaintiff/Appellant before the Ninth Circuit Court of Appeals and Respondent herein: Insurance Company of North America. Insurance Company of North America ("INA") is a corporation with its principal place of business in Philadelphia, Pennsylvania. Pursuant to Supreme Court Rule 29.1, INA states that its parent corporation is INA Financial Corporation. INA has no subsidiaries which have issued stock to the public. INA has the following affiliate which has issued stock to the public: CIGNA Corporation.

Defendant/Respondent before the Ninth Circuit Court of Appeals and Petitioner herein: G.I. Trucking Company.

Table Of Contents

	Page
Question For Review	i
Parties	ii
Table Of Contents	iii
Table Of Authorities	iv
Opinions Delivered In The Case	1
Jurisdiction	2
Statement of the Case	2
Argument Why The Writ Should Not Issue	4
Conclusion	7
Appendix	9

Table Of Authorities

Page

Cases

Bobst Div. of Bobst Champlain, Inc. v. IML-Freight, Inc., 566 F.Supp. 665 (S.D.N.Y. 1983) 7

Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U.S. 190, 36 S.Ct. 541, 60 L.Ed. 948 (1916) 7

Nedlloyd Lines, B.V. Corp. v. Harris Transport Co., Inc., 922 F.2d 905 (1st Cir. 1991) 5

Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900, 903 (2nd Cir. 1980), *cert. den.* 450 U.S. 915 (1981) 5

Salzstein v. Bekins Van Lines, Inc. 993 F.2d F.2d 1187 (5th Cir. 1993) 5

Taisho Marine & Fire Ins. Co., Inc. v. Vessel Gladiolus, 762 F.2d 1364 (9th Cir. 1985) 3

Codes, Statutes, Rules

49 Code of Federal Regulations

Section 1005 4

Section 1005 3

Case No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1993

G.I. TRUCKING COMPANY,
Appellant/Petitioner,

VS.

INSURANCE COMPANY OF NORTH AMERICA,
Appellee/Respondent.

U.S. Court of Appeal/
9th Cir. No. 92-15234
U.S.D.C. No. CV-91-02631-TEH

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Insurance Company of North America ("INA") respectfully requests that this Court deny the Petition of G.I. Trucking Company ("G.I. Trucking") for the issuance of a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit, filed August 2, 1993.

Opinions Delivered In The Case

G.I. Trucking's Petition for Writ of Certiorari seeks review of a decision of the United States Court of Appeals filed on August 2, 1993 in Case No. 91-15234. The Ninth Circuit's opinion is

designated for publication in the official reporter at 1 F.3d 903 (9th Cir. 1993). The Ninth Circuit opinion reversed the decision of the United States District Court for the Northern District of California, published at 783 F.Supp. 1251 (N.D. Cal. 1991). These opinions are attached to the Petition as Exhibits 1 and 2, respectively.

Jurisdiction

Respondent INA agrees with the jurisdictional statement provided on page 2 of G.I. Trucking's Petition for Writ of Certiorari.

Statement of the Case

This case concerns the application of the regulations of the Interstate Commerce Commission ("ICC") to a claim arising from a carrier's negligence in transporting products manufactured by INA's insured, Eye Technology, Inc. The damaged products, intraocular lenses, were ultimately to be delivered in Mexico, thus vesting the ICC with jurisdiction over the shipment. The goods were transported by Petitioner G.I. Trucking.

The issue raised by G.I. Trucking's petition herein is whether a written notice provided by INA's subrogation unit, Recovery Services, Inc., to G.I. Trucking following discovery of the damage satisfies the "claim" requirements of the ICC's regulations. Under the insurance policy issued to Eye Technology, INA insured the damage to the intraocular lenses, which was discovered on or about April 18, 1988 and was caused by moisture contamination in transit.

On December 2, 1993, an employee of Recovery Services, Inc. wrote G.I. Trucking, noting:

> We are the Subrogation Dept. for the Insurance Co. of North America: The Insurer of Eye Technology, Inc.
>
> This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (Estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment

to them we will send the final claim bill to you. We are enclosing herewith supporting documents pertaining to the above file for your record.

Hoping to receive your acknowledgement soon.

Yours very truly,

Uma Desai
R.S.I.

On March 27, 1989, Recovery Services, Inc. forwarded to Petitioner a form entitled "Standard Form for Presentation of Loss, " seeking the recovery of $100,000 for the damage caused to the insured's products. On April 4, 1989, G.I. Trucking denied responsibility for payment of the claim. Following an exchange of correspondence between the parties, Respondent filed suit in the Superior Court of the State of California, for the City and County of San Francisco. Petitioner thereafter removed the action to the United States District Court for the Northern District of California, where it was assigned Case No. CV-91-02631-TEH.

G.I. Trucking moved for summary judgment in the trial court, on the basis that a "claim" had not been presented within nine months, as required by 49 C.F.R. section 1005.2(b)(3). Specifically, Petitioner asserted that the December 2, 1988 letter from Ms. Desai set forth only an "estimate" and not a specified or determinable amount as required by the ICC's regulations. Although INA opposed the motion on the basis that its letter of December 2, 1988 was a "claim" as contemplated by the ICC regulations, the motion for summary judgment was granted in a December 31, 1991 order by the Honorable Thelton E. Henderson. (Petitioner's Exh. 2, B-1 to B-16.)

The Ninth Circuit Court of Appeals thereafter reversed Judge Henderson's order of summary judgment. (Petitioner's Exh. 1, A-1 to A-9.) The Court of Appeals reasoned that written claims are to be literally construed and that the form of the notice is less important than "its adequacy in apprising the carrier of the basis for the claim and of the fact that reimbursement will be sought." (Petitioner's Exh. 1, A-7, citing *Taisho Marine & Fire Ins. Co., Inc. v. Vessel Gladiolus,* 762 F.2d 1364, 1368 (9th Cir. 1985).) The Court therefore concluded that Respondent's December 2,

1988 letter satisfied the ICC regulations because there was "a written notice of damage and a clearly communicated intent to hold G.I. liable." (Petitioner's Exh. 1, A-7.) The Court of Appeals also observed that G.I. Trucking had actually investigated the claim after the December 2, 1988 notice, thus satisfying the principal purpose of the claims regulations. (Petitioner's Exh. 1, A-7 to A-8.) The Court also noted that the December 2 letter might satisfy the requirements of the ICC regulations even as strictly applied. (Petitioner's Exh. 1, A-8.)

Argument Why The Writ Should Not Issue

The Court of Appeals' decision is fully consistent with the ICC regulations as interpreted by that agency itself. The ICC recognizes that: (1) the primary purpose of the claims regulations is to facilitate investigation of the claim by the carrier, and (2) no precise dollar amount of the claim is necessary within the nine month period to facilitate such an investigation.

In fact, following promulgation of the claim regulations codified in 49 C.F.R. 1005(b), the ICC addressed the very issue before this Court. In an April 18, 1972 appendix to its second order, the ICC set forth "22 Questions and Answers" concerning the application of the regulations to specific factual situations. *Federal Register,* April 13-18, 1972. (Appendix, Exh. A.) Questions 1 and 2, and the ICC's answers thereto, were as follows:

> 1. *Question.* Do the provisions of Section 1005.2(b) and (d), when taken together, preclude the payment of a claim by a carrier when a claim is filed within nine months for $100 more or less, even though the exact amount of the claim cannot be determined until after the nine month period has lapsed?
>
> *Answer:* No. If the claim is filed with the carrier within nine months ... and the shipment involved is identified by the claimant seeking damages, payment is not barred by the fact that the specified amount claimed cannot be determined within the nine month period. The carrier must investigate the claim. It may not, however, voluntarily pay the claim until such time

as the amount of money due the claimant is specified and determinable.

2. *Question.* Does the filing of a claim for an uncertain amount toll the nine month period for filing claims provided in Section 2(b) of the Uniform Bill of Lading Contract?

Answer. It is not uncommon for shippers to file a claim for an unspecified amount in order to avoid having their claims barred by the limitations provisions of the Uniform Bill of Lading. A notice of an intention to file a claim and a claim itself are distinguishable mainly by their form and content. The courts have never prescribed or recognized any particular form that a claim must take. Moreover, the Supreme Court of the United States has emphasized that the written notice of a claim requirement must be given a reasonable and practical construction. That construction must be adapted to the circumstances of each particular case under consideration. The Supreme Court has also said that the requirement for filing a claim in writing is "addressed to a practical exigency and is to be construed in a practical way." Therefore, what constitutes a properly written claim, timely filed, is and will continue to be essentially a question of fact. (Appendix, Exh. A, p.2.)

The Court of Appeals' decision in this case follows the ICC's own directives that each claim is to be considered on its specific facts and, therefore, the failure to specify a sum certain within the nine month period does not necessarily preclude recovery by the claimant.

While other courts have adopted stricter interpretations of the ICC claims requirements in specific situations, there is no conflict between the circuits supporting the petition herein. The three decisions cited by Petitioner for the existence of a conflict are: *Nedlloyd Lines, B.V. Corp. v. Harris Transport Co., Inc.*, 922 F.2d 905, 908-909 (1st Cir. 1991), *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 903 (2nd Cir. 1980), *cert. den.* 450 U.S. 915 (1981) and *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d F.2d

1187 (5th Cir. 1993). These decisions can be reconciled, however, with the decision of the Ninth Circuit in this case.

The first decision, *Nedlloyd Lines, B.V. Corp. v. Harris Transport Co., Inc.*, supra, was erroneously referenced by the Ninth Circuit here as pertaining to the disposition of claims for loss or damage. *Nedlloyd*, however, involved a claim for freight charges incurred for the transportation of an overweight portion of a load removed from a trailer due to an inadequate overweight permit. Since damage. loss or delay to cargo or baggage was not involved, 49 C.F.R. section 1005.2 should not have been applicable to such a claim in the first instance and *Nedlloyd* therefore has no legal significance.

Pathway Bellows, Inc. v. Blanchette, supra, involved a loss and damage claim received one day later than the statutorily imposed nine month limit. The Second Circuit properly concluded in *Pathway Bellows* that the claim was untimely. 630 F.2d at 904-905. In the *Pathway Bellows* case, the only document sent by the shipper within the nine month period expressly indicated that it was not a "claim" and that the shipper was "in the process of filing a claim" for transit damage. 630 F.2d at 901. The decision of the Second Circuit therefore does not conflict with the Court of Appeals' opinion herein.

The decision in *Salzstein v. Bekins Van Lines, Inc., supra,* also does not support G.I. Trucking's petition. In *Salzstein*, no amount of loss was ever shown on the claims forms provided by the claimant, despite the carrier's repeated requests that such information be provided. 993 F.2d at 1191-1192. *Salzstein* should therefore stand only for the principle that a claim is not cognizable under the ICC regulations if it never states an amount of loss. Here, in contrast, INA's letter to Petitioner set forth an estimated amount of loss within the nine month period.

Finally, it must be observed that none of the decisions referred to above require that, in all circumstances, claims be perfected within nine months under the ICC regulations. To the contrary, many of the decisions have recognized exceptions, such as whether the claimant exercised "due diligence" to notify the carrier of the exact amount of the loss within nine months of its

occurrence. *See Nedlloyd Lines v. Harris Transport Co., Inc., supra,* 922 F.2d at 909; *Pathway Bellows, Inc. v. Blanchette, supra,* 630 F.2d 900, 905 (2nd Cir. 1980). The only decision purporting to create a stricter rule is *Bobst Div. of Bobst Champlain, Inc. v. IML-Freight, Inc.*, 566 F.Supp. 665, 669 (S.D.N.Y. 1983). *Bobst*, is a district court decision and does not create the conflict between the circuits which is a prerequisite to the granting of G.I. Trucking's petition.

The Ninth Circuit correctly followed this Court's observations that the satisfaction of a shipper's notice to a carrier "does not require documents in a particular form" and "is to be construed in a practical way." *Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U.S. 190, 198, 36 S.Ct. 541, 60 L.Ed. 948 (1916)*. The Court of Appeals's decision is not in conflict with the decisions of other circuits, and the petition should therefore be denied.

Conclusion

For the reasons set forth above, Respondent requests that the Petition for Writ of Certiorari be denied by the Court.

Respectfully submitted,

GLEN R. OLSON
LONG & LEVIT
101 California Street, Suite 2300
San Francisco, California 94111
(415) 397-2222
Insurance Company of North America
Counsel of Record

ROBERT C. CHILES
LONG & LEVIT
Of Counsel

APPENDIX

A. Order of the Interstate Commerce Commission, April 18, 1972 ..... A-1

APPENDIX

22 QUESTIONS AND ANSWERS IN APRIL 18, 1972 ORDER, EX PARTE 263

Service Date
April 18, 1972

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 13th day of April, 1972.

EX PARTE NO. 263

RULES, REGULATIONS, AND PRACTICES OF REGULATED CARRIERS WITH RESPECT TO THE PROCESSING OF LOSS AND DAMAGE CLAIMS

Upon consideration of the record in the above-entitled proceeding, including our report and order at 340 I.C.C. 515, and of:

(1) Joint Petition of Missouri Pacific Railroad Company, the Texas and Pacific Railway Company, and Chicago & Eastern Illinois Railroad, respondents, filed March 23, 1972, for reconsideration;

(2) Petition of Missouri-Kansas-Texas Railroad Company, respondent, filed March 27, 1972, for reconsideration;

(3) Petition of the Association of American Railroads, on behalf of its members (except respondent in (2) above), filed March 27, 1972, for reconsideration.

It appearing, That full and effective implementation by all segments of the carrier industry subject to our jurisdiction of the regulations prescribed in this proceeding generally requires a delay in the effective date of those regulations until July 1, 1972, but that the carriers are urged to bring their claims-processing practices into compliance with those regulations at the earliest possible opportunity prior to that date;

It further appearing, That other than granting additional time within which respondents must comply with the regulations set forth in Appendix E to the report and order served herein on February 24, 1972, no need has been shown further to consider the pleadings or grant the relief prayed therein;

It further appearing, That in their argument urging reconsideration, petitioners in (2) and (3) above, raise several questions of general interest as to the meaning of the new regulations; that inasmuch as these questions involve matters of concern not only to the parties to this proceeding but also to the public at large they should be answered; and that in view of their importance and widespread effect these questions have been extracted from the pleadings and appropriate answers thereto are set forth in the appendix to this order; and good cause appearing therefor;

It is ordered, That the petitions in (1), (2) and (3) above be, and they are hereby, denied, for the reasons that no sufficient or proper cause appears for reconsidering the order of February 3, 1972, served February 24, 1972.

It is further ordered, That the effective date of the rules prescribed in the order entered herein on February 2, 1972, be, and it is hereby, postponed to July 1, 1972, and that such rules will apply on all claims for loss, damage or delay in transit to property moving in interstate or foreign commerce received by carrier or freight forwarder respondents hereto on and after the said effective date.

By the Commission.

(SEAL)

ROBERT L. OSWALD
Secretary

SECTION 1005.2

1. *Question.* Do the provisions of sections 1005.2(b) and (d), when taken together, preclude the payment of a claim by a carrier when a claim is filed within 9 months for "$100 more or less," even though the exact amount of the claim cannot be determined until after the 9-month period has elapsed?

Answer. No. If a claim is filed with a carrier within 9 months, or any other period of longer duration that the carrier may establish for filing of claims, and the shipment involved is identified by the claimant seeking damages, payment is not barred by the fact that the specific amount claimed cannot be determined within the 9-month period. The carrier must investigate the claim. It may not, however, voluntarily pay the claim until such time as the amount of money due the claimant is specified or determinable.

2. *Question.* Does the filing of a claim for an uncertain amount toll the 9-month period for filing claims provided in section 2(b) of the uniform bill of lading contract?

Answer. It is not uncommon for shippers to file a claim for an unspecified amount in order to avoid having their claims barred by the limitations provisions of the bill of lading. A notice of an intention to file a claim and a bona fide claim itself are distinguishable mainly by their form and content. The courts have never prescribed or recognized any particular form that a claim must take. Moreover, the Supreme Court of the United States has emphasized that the written notice of a claim requirement must be given a reasonable and practical construction. That construction must be adapted to the circumstances of each particular case under consideration. The Supreme Court also has said that the requirement for filing a claim in writing is "addressed to a practical exigency and it is to be construed in a practical way." Therefore, what constitutes a properly written claim, timely filed, is and will continue to be essentially a question of fact.

SECTION 1005.3

3. *Question.* May a carrier acknowledge receipt of a cargo loss and damage claim without having first made a preliminary examination of the documents submitted in support thereof by the claimant?

Answer. No. The regulations require a carrier to make a preliminary examination of the claim and the documents submitted in support thereof. The carrier must then indicate in its acknowledgment to the claimant what, if any, further documentation may be required for it further to process the claim.

4. *Question.* Is it necessary that the carrier note the claim file number on all documents filed in support of a claim and all records and correspondence with respect thereto, or is it sufficient for purposes of compliance for the carrier simply to note the claim file number on a file jacket and place therein all documents necessary to the disposition of the claim?

Answer. The claim file number must be noted on all documents, records, and correspondence pertaining to the claim, including the shipping order and delivery receipt if they are in the carrier's possession.

5. *Question.* Do the provisions of section 1005.3 require carriers to purge their general claim records, match records taken therefrom to individual claims, and number all documents and records with respect thereto prior to setting up a claim file and acknowledging receipt of the claim?

Answer. No. This section requires carriers to *create* a separate file for each claim, assign a successive number thereto, and note that number on all documents filed in support thereof. Acknowledging receipt of a claim should not be delayed pending the compilation of the complete claim file.

6. *Question.* Why is it necessary to note the claim file number on the shipping order and delivery receipt when those documents are in the carrier's possession?

Answer. When a carrier is the originating or destination carrier, or both, it is essential to the proper investigation of a

claim, that these documents be examined to determine the condition of the shipment at origin and destination in order to determine carrier liability. Noting the claim file number on those documents not only establishes that they have been checked in processing the claim, but it also provides additional assurance to the carrier that a duplicate claim on the same shipment will not inadvertently be paid in the future.

SECTION 1005.4

7. *Question.* Do the provisions of section 1005.4(b), pertaining to documents in support of claims prohibit (1) the practice of filing with carriers "bonds of indemnity" in lieu of original bills of lading as supporting documents for cargo claims, and (2) the use of photographic reproductions of bills of lading in lieu of the original bills?

Answer. This Commission has not ordered the discontinuance of the use of bonds of indemnity or photographic reproductions in lieu of original bills of lading. The first phrase of the regulation, "When a necessary part of an investigation" is indicative of the fact that the regulations do not *require* the original document to be filed in all instances. If, however, the original document is necessary to the proper disposition of a claim, it must be produced by the claimant, or at least examined by the carrier in order to verify controlling facts evidenced by the bill.

8. *Question.* Do the provisions of section 1005.4(c), pertaining to the verification of certain losses, mean that a shipper absolutely cannot have a cargo claim paid by a carrier absent a certified statement from the consignee of the shipment that the property involved has not been received from any other source?

Answer. No. The underlying purpose of all of the regulations is to motivate fact-finding efforts and to encourage, as much as regulations can, responsible claim-prevention as well as claim-processing practices. Section 1005.4(c) should induce the fullest practicable investigation of all shortage claims. This Commission is aware, however, that a shipper-claimant and a carrier may encounter difficulty in concluding certain claims because a consignee whom they cannot control may prove to be uncooperative

and decline to execute the document. When such circumstances are clearly established in the processing of a claim, the regulation should not be construed to require the performance of an impossible act. Inasmuch as section 1005.4(c) is largely an adaptation of a practice recommended by the Freight Claim Division of the Association of American Railroads for processing shortage claims in excess of $100, it should be given practical effect.

SECTION 1005.5

9. *Question.* Is a carrier now required to pay all cargo claims filed with it?

Answer. No. The provisions of section 20(11) of the Interstate Commerce Act and sections 190-196 of the Harter Act have not been affected by this Commission's promulgation of regulations to govern the processing of cargo claims. Carrier liability is determined by the facts and applicable law in each case and the provisions of section 1005.5 should not be construed as requiring payment in all instances.

10. *Question.* Is a destination carrier in a joint-line haul required by the new regulations to bear the full responsibility of a claim for concealed damage that clearly occurred in transportation but which cannot be attributed solely to one carrier?

Answer. No. Nothing in this Commission's regulations or its decision prohibits carriers from apportioning concealed damage claims where it has been reasonably shown by the claimant that the damage for which claim is made occurred while the shipment was in transit. The decision prohibits, however, the arbitrary application of percentages and other formulae by which carrier liability to a shipper or receiver is reduced. The decision also discourages the arbitrary sharing by carriers participating in the transportation of damages which are not likely to have been caused by each of the participating carriers.

11. *Question.* May a carrier disallow a claim until the supporting documents required under the regulations are contained in the claim file?

Answer. The answer to this question really depends upon the meaning of the word "disallow." a carrier may not pay a claim until such time as it is fully and properly supported. The regulation should not be construed, however, to mean that a given claim should be declined or returned when it is filed simply because certain of the required supporting documents have not been supplied or are not in the file.

12. *Question.* What reasons will permit a carrier to close a file and what reasons will exempt it from issuing the 120-day and 60-day notification to the claimant?

Answer. A carrier may close its file on a claim at any time after the claim has been paid in full or declined or the carrier and the claimant have mutually agreed to a fair compromise settlement which has been accomplished. A notification to the claimant of the status of his claim and the reason for its not having been concluded prior thereto must be given on all claims that remain open at the expiration of 120 days and at the expiration of each succeeding 60-day period. No exemptions from the notice requirements are provided in the regulations. So long as the claim remains open or pending in the carrier's records, the notice requirements apply.

13. *Question.* Are carriers now forbidden to prorate damages among those participating in a joint-line haul when processing and settling cargo claims?

Answer. No. This Commission found that when carriers enter into agreements to prorate cargo claims damages for which they *clearly* are *not* responsible, they violate the letter and spirit of sections 20(11) and 20(12) of the Interstate Commerce Act. This finding, however, should not be construed to mean that all arrangements are unlawful *per se.* Essentially, it means that a carrier may not lawfully prorate damages with other carriers for which it alone is *clearly and fully* responsible. Nor may such carrier participate with another carrier by paying a portion of the damages on a claim for which it is clearly and fully *not* responsible. Whenever liability cannot clearly be determined as among participating carriers, and it is nevertheless established that the loss or damage occurred while the property was in transit, the

decision does not prohibit participating carriers from agreeing fairly to prorate damages. Under those circumstances, however, carriers must publish their practices in their tariffs filed with this Commission. Agreements of this type also must be filed with this Commission.

14. *Question.* Are regulated carriers now subject to fines for paying concealed damage claims?

Answer. The regulation adopted in the *Claims* decision must be obeyed, and any carrier found to be in violation thereof will be subject to the imposition of fines and other penalties pursuant to the applicable provisions of the Interstate Commerce Act and the Elkins Act. The mere payment of a concealed damage claim, standing alone, will in no instance expose a carrier to a possible fine. There must be evidence that a violation of the law or the regulations has occurred. Evidence of such violations might, for example, show that a carrier has paid a claim where liability has not reasonably been established.

15. *Question.* If a TOPC (piggyback) shipment is accepted by a carrier and a standard bill of lading is issued therefor, is the liability of the carrier issuing the bill the same as that for any other shipment subject to the Interstate Commerce Act and the terms of the bill of lading contract?

Answer. Yes. There is no distinction provided in section 20(11) of the act, which defines carrier liability, between shipments moving wholly by one mode of transport and intermodal shipments. Under section 20(11) of the statute, the carrier issuing a receipt or bill of lading for a shipment is liable for the full actual value thereof if it is lost or damaged while in the custody of the carrier. Furthermore, the carrier issuing the receipt or bill of lading is responsible to a bona fide claimant even if the loss or damage occurs on the line of another carrier.

16. *Question.* May a cargo claim for concealed damage, which has been previously settled on a prorated basis under a carrier rule found to be unlawful, now be reviewed for the purpose of obtaining recourse with full payment if damage is established as carrier inflicted?

Answer. Yes. The *Claims* decision declared that carrier rules limiting their claims liability violate section 20(11) of the act. Where carrier-inflicted damage has occurred and liability for a claim has been reduced to less than the full actual loss, damage, or injury to the goods involved, the carrier is responsible for the difference between the full value and the amount paid unless the amount conforms to the carrier's maximum liability under a released rate approved in an order of this Commission. Claimants may seek to recover any balance due them, but any conclusive determination of this question must be by a court of competent jurisdiction under the law as it now exists. A court may find relevant to this determination, the questions as to whether a claimant has or has not voluntarily amended his claim or agreed to the compromise settlement thereof and whether it has or has not executed a release endorsement of a settlement check issued by the carrier.

SECTION 1005.6

17. *Question.* If a carrier has no intention of paying a claim, should it not refuse to pick up the salvage and advise the consignee at the time of its declared non-liability?

Answer. Yes. A carrier that has no intention of paying a claim should refuse to pick up damaged property for the purpose of salvaging it. Otherwise its conduct may induce the claimant to act in a manner that would not be in his best interests. Because a carrier has no right to salvage property unless it intends to pay the claim, it should be careful not to mislead a claimant into expecting payment if that is not the carrier's intention at the time.

18. *Question.* May a carrier pick up and take possession of damaged goods, disposing of them as salvage and offer the proceeds to the claimant if he has no intention of paying the claim from the moment the shipment was tendered for transportation?

Answer. Under the provisions of section 1005.6 the carrier must, if it disposes of salvage property, do so only in a manner that will fairly protect the rights of all parties with an interest therein. The carrier must also maintain certain records on salvage and salvage proceeds, including identifying salvage lot numbers

which must be noted in related cargo claims files. In a purely technical sense, the new salvage regulation does not apply when a shipment has been delivered without exception by the carrier, and, under a subsequent arrangement with the consignee, the carrier picks up the property for the purpose of disposing of it through its salvage channels. The fact that a carrier may agree with a claimant to dispose of damaged property would not create liability for a claim where that liability does not otherwise exist. Such liability is determined on the basis of facts and law and these may vary with each shipment. Certainly, however, if a carrier has admitted responsibility for a claim, or the investigation of the facts surrounding the claim establishes its liability, there is no excuse for a carrier's not paying the claim promptly. There will always be a need for carriers and claimants to disclose and discuss fully the controlling facts and their intentions and views with respect to claims and salvage, especially when a carrier picks up already-delivered freight for the purpose of salvaging it.

19. *Question.* What can be done when a carrier improperly withholds salvage proceeds from the rightful owner?

Answer. It is possible that a carrier might find it unusually difficult or even impossible promptly to determine the person rightfully entitled to receive salvage proceeds. Whenever a carrier is believed to have a practice, a policy, or an attitude of wrongfully failing to transmit salvage proceeds, or the carrier transmits salvage proceeds in a dilatory or irresponsible manner, aggrieved persons, in addition to other legal remedies, may seek the assistance of this Commission which has jurisdiction over the claims-processing practices of regulated carriers.

20. *Question.* Must the notice required to be given to parties with an interest in property damaged in transit be given in any specific form, such as, for example, certified mail?

Answer. No. Due notice must be given to the owner and other interested parties (this may include connecting carriers) whenever practicable to do so, but the regulations do not specify any particular form that the notice must take. There will no doubt be many situations in which the giving of notice by telephone will better serve the interests of all concerned than the giving of

written notice. Deciding upon the form of the notice will in many instances be dictated by considerations of how best to mitigate further damages to the property and parties with an interest therein. Notice required by the claims-processing regulations, however, should not be construed as altering a carrier's duties with respect to on-hand freight. The provisions of section 4(b) of the bill of lading are not affected by section 1005.6 of the regulations.

21. *Question.* May a carrier's freight bill number serve as a salvage lot number?

Answer. Yes, but a carrier must decide initially whether it will utilize the freight bill number in that manner in *all* instances of salvage goods. It would not constitute compliance with the successive lot number requirement of the regulation for the carrier on some occasions to apply a separate salvage lot number and at other times to use the freight bill number. It is possible, for example, in the latter situation for different lots of salvage to have the same number. In the designation of lots of salvage by freight bill number, carriers that use prefix or suffix numbering or lettering codes to identify terminals or points of origin, must be certain to include those codings in the salvage lot number in order to avoid duplicate lot numbers.

22. *Question.* Must carriers keep an accurate record of every item sold through a public salvage store?

Answer. Carriers are required to make an itemized record sufficient to identify the property salvaged so as to enable them to correlate that property and the shipment or transportation involved, and any claim filed thereon. The carrier must, as noted above, assign to each lot of salvage property, a successive lot number and note that lot number on its record of shipment and claim, if any. In the disposition, for example, of a case containing 24 bottles of a given product, the regulations applicable to the disposition of salvage would not require the carrier to make a separate entry in its salvage and claim record for each of the 24 bottles as they are sold by its salvage agent. It would suffice if the carrier maintained a record of the property in a sufficiently

itemized manner so as to enable it to identify the transportation involved.

However, if salvage goods are sold by the carrier to an agent or employee of the carrier, or if such property is disposed of through a salvage agent in which a director, officer, or manager of the carrier is interested, financially or otherwise, more detailed requirements apply. In those instances the carrier's salvage records must fully reflect the particulars of each such transaction or relationship as the case may be.